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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

CODY WADE HENSON,

Defendant and Appellant.

F077228

(Super. Ct. Nos. F12908810,  
F12907780)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Gary D. Hoff, Judge.

Barbara A. Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Ivan P. Marrs and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Levy, Acting P.J., Detjen, J. and DeSantos, J.

Appellant Cody Wade Henson appeals from the trial court's denial of his application pursuant to Proposition 47 (the Safe Neighborhoods and Schools Act) to reduce two felony convictions for unlawfully taking or driving a vehicle (Veh. Code, § 10851, subd. (a)) to misdemeanors.<sup>1</sup>

On appeal, Henson contends the court erred in denying his application. We affirm.

### **FACTS**

On January 13, 2013, in case No. F12907780 (case No. 780), Henson pled no contest to unlawfully taking or driving a vehicle. In case No. F12908810 (case No. 810), he pled no contest to one count each of evading a peace officer (§ 2800.2) and unlawfully taking or driving a vehicle.

The probation report that was prepared for both cases indicates that on October 1, 2012, police officers were told by a citizen informant that Henson had been riding a stolen motorcycle earlier that day. Officers went to a location provided by the informant, found the motorcycle, and arrested Henson. The owner of the motorcycle confirmed it had been stolen and that he did not give Henson permission to ride it (case No. 780).

On October 28, 2012, after spotting Henson driving a stolen car, police officers arrested Henson following a short chase (case No. 810).

On January 18, 2018, Henson filed an application to have each of his felony convictions for violating section 10851 reduced to misdemeanors pursuant to Proposition 47. The application did not have any documents attached to it.

The application was scheduled to be heard on February 26, 2018. However, on that date the court granted a continuance to allow defense counsel to submit written argument.

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<sup>1</sup> All further statutory references to are to the Vehicle Code, unless otherwise indicated.

In a brief filed on March 26, 2018, with respect to case No. 810, defense counsel alleged, in pertinent part, that the car Henson was driving on October 28, 2012, had been reported stolen at 7:00 a.m., and that Henson was seen driving the car at 12:12 p.m. Counsel also alleged that, according to a police report in that matter, the vehicle was worth \$500. The brief, however, did not allege any facts relating to the violation of section 10851 in case No. 780.

During a hearing on March 26, 2018, the prosecutor noted that in case No. 810 the vehicle was stolen at 7:00 a.m., and Henson was found driving the vehicle at approximately 12:00 p.m. Thus, according to the prosecutor, under *People v. Page* (2017) 3 Cal.5th 1175 (*Page*), there was a sufficient period of time between the taking and the driving of the car to render that conviction ineligible to be reduced pursuant to Proposition 47. Defense counsel responded by referring to two cases cited in *Page* in which periods of four days and 64 days were found to constitute substantial breaks between the theft and posttheft driving to render the convictions for violating section 10851 ineligible to be reduced pursuant to Proposition 47. Based on those cases, he argued that “there had not been a substantial break” between the theft and the driving of the car in case No. 810.

The court then allowed Henson to testify. During questioning by defense counsel, Henson testified to having committed numerous auto thefts, including some in 2012. When he stole cars, he would drive them, drop them off somewhere and keep them for weeks or months. In both theft cases at issue, his intent was to keep them as long as he could. During cross-examination, however, Henson could not state how many cars he stole in 2012 or describe the car involved in case No. 810.

After Henson’s testimony, defense counsel argued that intending to take a car for weeks or months established an intent to permanently deprive the owner of the substantial use of the car, that all auto theft convictions in which the value of the car does

not exceed \$950 were eligible to be reduced, and that the police report in case No. 810 established that the value of the car involved in that case was \$500.

The prosecutor addressed each case separately and acknowledged that the value of the car involved in case No. 810 was \$500. However, he argued that Henson's conviction in that case was not eligible to be reduced to a misdemeanor because Henson could not state what his intent was with respect to that car and the time between the theft and posttheft driving of that car exceeded five hours. Additionally, the prosecutor noted that case No. 780 involved a motorcycle and he argued that Henson's conviction in that case was not eligible to be reduced because, according to a police report, it was worth \$8,000.

In denying the application as to both convictions, the court noted that the burden of proof was on the defense and it found Henson's testimony insufficient to establish that the application should be granted as to either conviction.

### **DISCUSSION**

Henson contends the court erred in denying his application because there is virtually no possibility that he drove, but did not steal, the vehicle in each case. In support of this assertion he notes that "per all the reports, he was known as a car thief" and "he stole an unknown number of cars in the same time period, and kept them as long as he could." With respect to case No. 780, Henson asserts, without any factual basis in the record, that the violation of section 10851 in that case involved him stealing a motorcycle on October 1, 2012, and driving it the same day. As to both cases, he asserts that there was no substantial break between the theft and when he was seen driving the vehicle involved in each case. Henson further contends that although the record established that the car involved in case No. 810 was worth \$500, because it fails to establish the value of the motorcycle involved in case No. 780, the matter should be remanded to the trial court so the motorcycle's value can be established. We reject these contentions.

“In *Page*, the California Supreme Court determined that ‘Proposition 47 makes some, though not all, [Vehicle Code] section 10851 defendants eligible for resentencing.’ [Citation.] Specifically, the court held that a ... section 10851 conviction may be resentenced to a misdemeanor ‘if the vehicle was worth \$950 or less and the sentence was imposed for theft of the vehicle.’ [Citation.]

“Our high court explained that a person who has been convicted of grand theft is ‘clearly eligible’ for resentencing under [Penal Code] section 1170.18 if the value of the property taken was \$950 or less. (*Page, supra*, 3 Cal.5th at p. 1182; see [Pen. Code,] § 490.2, subd. (a).) The court observed that ‘while ... section 10851 does not expressly designate the offense as theft, the conduct it criminalizes includes theft of a vehicle. ... And to the extent vehicle theft is punished as a felony under section 10851, it is, in effect, a form of grand, rather than petty, theft.’ [Citation.]

“The court further explained: ‘Theft ... requires a taking with intent to steal the property—that is, the intent to permanently deprive the owner of its possession.’ [Citation.] ‘“Unlawfully taking a vehicle with the intent to permanently deprive the owner of possession is a form of theft, and the taking may be accomplished by driving the vehicle away. For this reason, a defendant convicted under ... section 10851[, subdivision ](a) of unlawfully taking a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction .... On the other hand, *unlawful driving of a vehicle is not a form of theft when the driving occurs or continues after the theft is complete.* ... Therefore, a conviction under section 10851[, subdivision ](a) for posttheft driving is not a theft conviction ....” [Citation.] The same is true when a defendant acted with intent only to deprive the owner temporarily of possession. Regardless of whether the defendant drove or took the vehicle, he did not commit auto theft if he lacked the intent to steal. But if the defendant was convicted under ... section 10851, subdivision (a), of unlawfully taking a vehicle with the intent to permanently deprive the owner of possession, he has, in fact, “suffered a theft conviction.” ’ [Citation.] Consequently, ‘[a] person convicted before Proposition 47’s passage for vehicle theft under ... section 10851 may ... be resentenced under [Penal Code] section 1170.18 if the person can show the vehicle was worth \$950 or less.’ [Citation.]

“ ‘A defendant seeking resentencing under [Penal Code] section 1170.18 bears the burden of establishing his or her eligibility, including by providing in the [application] a statement of personally known facts necessary to eligibility.’ [Citation.] If the defendant fails to meet this

burden, the trial court's order denying the [application] must be affirmed, even if the trial court expressed a different reason for denying the [application]. [Citation.] '[O]n appeal we are concerned with the correctness of the superior court's determination, not the correctness of its reasoning. [Citation.] " '[W]e may affirm a trial court judgment on any [correct] basis presented by the record whether or not relied upon by the trial court.' " ' [Citation.]

"To establish eligibility for resentencing or redesignation for a ... section 10851 conviction, the defendant must show that (1) *the conviction was based on theft of the vehicle, rather than on posttheft driving or on a taking without the intent to permanently deprive the owner of possession, and (2) the vehicle was worth \$950 or less.*" (*People v. Orozco* (2018) 24 Cal.App.5th 667, 671–673, italics added.)

Henson's application did not include any documents or statements based on the declarant's personal knowledge that established Henson was the person who actually stole the vehicle involved in either of Henson's convictions for violating section 10851. Nor did he testify at the hearing that he had the intent to steal the vehicles at issue or that he was the person who actually stole either vehicle. Although the parties agreed to a value of \$500 for the car involved in case No. 810, Henson did not provide any evidence to establish the value of the motorcycle involved in case No. 780. Henson also did not provide any evidence that established when the motorcycle was stolen or how long after the theft he was seen riding it.

Moreover, a theft is complete when the thief reaches a place of temporary safety. (*People v. Gomez* (2008) 43 Cal.4th 249, 255.) At least five hours elapsed between the time the car involved in case No. 810 was stolen and when Henson was found driving it. That was more than ample time for Henson to reach a place of safety if indeed he was the person who stole the car. That other cases have found a substantial break between the theft and the posttheft driving based on longer periods of time does not alter this conclusion. Since Henson did not meet his burden of showing he was entitled to relief pursuant to Proposition 47, his application was properly denied as to both convictions.

Further, in *Page* the court remanded the matter because the proper allocation of the burden of proof and the facts necessary to resentencing on a section 10851 conviction were not set out expressly in the text of Proposition 47, and neither had yet been judicially articulated when the defendant in that case submitted his petition for recall. (*Page, supra*, 3 Cal.5th at p. 1189.) That is not the case here. Accordingly, we reject Henson's request to remand this matter.

#### **DISPOSITION**

The judgment is affirmed.